IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 5020 OF 2005

WITH

WRIT PETITION NO. 5227 OF 2005

BASTAWAD MASHID (DEV.) TRUST .. PETITIONERS

Versus

MAHAMMAD HANIF KHADIR PATIL & ORS. RESPONDENTS

Mr. A. B. Borkar for petitioners

Mr. G. S. Godbole for R-1 to 5

CORAM:-SMT. RANJANA DESAI, J.

DATED:-28/9/2005.

P.C.

. Both these petitions can be disposed of by a common order because they arise from the same suit and the parties are the same. The petitioners in both these suits are the plaintiffs and the respondents in both the petitions are the defendants. The petitioners filed Special Civil Suit No. 149 of 1996 seeking possession of the suit properties from the defendants on the ground inter alia that the plaintiffs are the owners of

the suit property and the defendants are trespassers. Two different orders passed in the said suit are challenged in these two writ petitions.

2. About certain dates there is no dispute. In the suit issues were framed on 11/2/97. Additional issues were framed on 24/1/2004. The defendants filed application Exh. 188 praying that issues No. 11, 13 and 14 may be decided as preliminary issues. The said issues read as under:-

(11) Whether this court has jurisdiction to try this suit?

(13) Whether the present suit is maintainable without obtaining the prior permission of the Charity Commissioner u/s. 51 of Bombay Public Trust Act?

14) Whether this Court has any jurisdiction to make enquiry about the amount of gross average annual income and expenditure of such trust?

3. By the order impugned in Writ Petition No. 5020 of 2005 the trial court allowed the

application and ordered that the said issues be treated as preliminary issues and tried as preliminary issues under sub-rule (2) of Rule 2 of Order 14 of the Code of Civil Procedure ("the Code" for short).

4. Mr. Borkar, learned counsel appearing for the petitioners contended that the learned judge was wrong in directing that these issues be treated as preliminary issues and tried as such. He contended that these issues do not raise pure questions of law and on the plain reading of Order 14 sub-rule (2) of Rule 2 it is clear that issues which require leading of evidence cannot be treated as preliminary issues and tried as such. He drew my attention to Sections 50 and 51 of the Bombay Public Trust Act, 1950. He contended that Section 50 provides for suits which can be filed by or against or relating to public trusts or trustees or others. He referred to Section 51 under which consent of the Charity Commissioner is necessary for filing a suit of the nature specified in Section 50 . The learned counsel pointed out that, however, it is settled law that if a suit is filed against a trespasser consent of the Charity Commissioner is not necessary. He submitted that

it is the case of the plaintiff that the defendants are trespassers and in order to prove that evidence will have to be led. Therefore, issue no. 13 does not involve pure question of law. Issues no. 11 and 14 will also require leading of evidence and as such the trial court could not have directed that they may be tried as preliminary issues.

5. In this connection the learned counsel relied on judgment of this court in Maharashtra State Warehousing Corporation Ltd., Pune v. Bhujang Krishnaji Kohale, 1999 (3) Mh. L.J. 652, where while dealing with Order 14 Rule 2 (1) and (2) of theCode this court has observed that the issues of law which require leading of evidence or investigation into facts should not be tried as preliminary issues. The learned counsel therefore, submitted that the trial court’s order deserves to be set aside.

6. So far as Writ Petition No. 5227 of 2005 is concerned, in this writ petition order dated 16/4/05 rejecting the application filed by the plaintiff for deleting issue No. 14 is under challenge.

7. Mr. Borkar contended that issue No. 14 is not involved in this suit. There is no prayer in respect thereof and hence the learned Judge ought to have deleted it. He contended that while rejecting the prayer, the learned Judge wrongly held that because while framing issues the plaintiffs were heard and that order was not challenged by the plaintiffs, the plaintiffs could not have filed such an application. He submitted that the approach of the learned Judge is clearly erroneous.

8. In this connection the learned counsel relied on judgment of this court in Shraddha Associates, Pune & Anr. v. St. Patrick's Town Co-operative Housing Society Ltd. & Ors., 2003(2) Mh. L.J. 219, where this court has held that framing of issue is obligation of the court in order to find out the exact nature of the controversy and to narrow down the scope of the dispute between the parties so as to enable both the parties to the proceedings to know the exact nature of the case which they are required to meet in the proceedings. It is further observed that in case there is any error on the part of the court in framing such issues, nothing forbids the parties from bringing

such error to the notice of the court and request for amendment or deletion or framing of additional issues, as the case may require and the court can amend and/or strike down the issues as and when occasion arises for the same. The learned counsel, therefore, urged that the application was wrongly rejected.

9. As against that Mr. Godbole, learned counsel for the respondent contended that under Article 227 of the Constitution of India this court should not interfere with the discretionary orders of the trial court, if there is no patent illegality. In this connection he relied on Estrella Rubber v. Dass Estate (P) Ltd., (2201) 8 S.C.C. 97. He contended that the impugned orders do not suffer from any perversity or illegality and hence this court should not interfere with them. Mr. Godbole placed reliance on Shraddha Associate's case (supra) and contended that though it is true that issues which requires leading of evidence are generally not to be tried as preliminary issues in a given case the court can do so by ensuring that there is no duplication of evidence. He submitted that the petitioners are guilty of latches and, therefore, this court should not interfere with the

impugned orders.

10. I may first deal with Writ Petition No. 5020 of 2005. It is pertinent to note that the suit is of the year 1996. On 11/2/97 issues were framed. It appears that the plaintiff made an application for amendment of plaint Exhibit 168 in 2003. Fresh paragraphs were added. Consequently written statement was amended in the year 2003. On 18/9/03 the defendants made application Exh. 186 for framing of additional issues. On 22/1/04 additional issues were framed. On 12/2/04 the defendants made application that issue Nos. 11, 13 and 14 be treated as preliminary issues. This application was allowed on 29/7/2004. However, the petition is filed on 30/6/05, i.e. after about 11 months. In paragraph 14 of the petition it is merely stated that the judgment and order is passed on 24/7/04, therefore, there is no delay /latches in filing the present petition. This is hardly any explanation. Delay by itself may not persuade this court to deny relief to a party in writ petition. However, some explanation must be given as to why the party has approached the court so late. In this case I am informed that the evidence has already begun. Therefore, in my opinion, this is

certainly not a case where this court should interfere with impugned orders at this stage.

11. It is true that in Maharashtra State Warehousing Corporation's case (supra), this court has held that issues of law which require leading of evidence or investigation into facts should not be tried as preliminary issues but in Shraddha Associate's case (supra) while accepting this principle, this court has further observed that at the same time if the court is able to ascertain from the parties that the issue of jurisdiction can be decided on the basis of limited evidence which may be led by the parties and such evidence would not be duplication of the evidence on other issues then certainly the parties can be allowed to address the court on the issue of jurisdiction considering it as a preliminary issue and it can be tried and disposed of accordingly. It is further observed that it all depends upon facts of each case and there cannot be any hard and fast rule in that regard. This court has further gone on to observe as follows:

. "In fact considering this aspect itself, the Legislature has used the terminology "if it thinks

fit" in sub-rule (2) while giving ample discretion to the court to decide as to whether the point of jurisdiction and bar to the suit to be tried as preliminary issues or not, while postponing the settlement of other issues albeit, the discretion has to be exercised judiciously".

12. In this case, therefore, the trial court can avoid duplication of evidence by directing the parties to lead limited evidence. Considering the latches and the settled position of law in my opinion Writ Petition No. 5020 of 2005 deserves to be rejected.

13. So far as Writ Petition No. 5227 of 2005 is concerned, the additional issues were framed on 22/1/04. It is the case of the petitioner that issue No. 14 does not arise at all. If that was so then the application for deletion ought to have been filed immediately. The application for deletion is filed on 28/10/04, i.e. after the period of nine months. As I have already noted that leading of evidence has already begun. On this ground alone, in my opinion, this writ petition will have to be dismissed.

14. There can be no dispute about the proposition laid down in Shraddha Associate's case on which Mr. Borkar placed reliance that in case there is any error on the part of the court in framing issue nothing forbids the parties from bringing such error to the notice of the Court and request for amendment or deletion or framing of additional issues but the party cannot allow the trial to proceed and at belated stage make an application for deletion of issues. In view of this, in my opinion, even Writ Petition No. 5227 of 2005 cannot be entertained.

15. Besides it is a settled principle of law as laid down by the Supreme Court in Estralla Rubber's case that the exercise of power under Article 227 of the Constitution of India involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where, if the High Court does not interfere, a grave

injustice remains uncorrected. It is further observed that it is well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record.

16. In view of the above, in my opinion, this is not a case where there is any patent illegality or perversity warranting interference. This is not a case where grave injustice is likely to be caused to the parties. Besides the latches disentitle the petitioners from getting any reliefs from the court. Hence both the petitions are rejected.

17. At this stage the learned counsel for the petitioners says that the direction be given to the trial court to decide the suit within a time bound programme. The trial court is directed to decide the suit expeditiously.

(SMT. RANJANA DESAI, J.)